

STATE OF MICHIGAN
COURT OF APPEALS

TWIN RIVERS DEVELOPMENT,

Petitioner-Appellee,

v

TOWNSHIP OF MACOMB,

Respondent-Appellant.

UNPUBLISHED

October 20, 2011

No. 298084

Tax Tribunal

LC No. 00-324513

Before: M. J. KELLY, P.J., and FITZGERALD and WHITBECK, JJ.

PER CURIAM.

In this tax assessment case, respondent Macomb Township appeals as of right the tax tribunal's order granting judgment in favor of petitioner Twin Rivers Development. We affirm.

I. FACTS

A. DESCRIPTION OF THE PROPERTY

The property at issue is a vacant, approximately 12-acre parcel located on the north side of Hall Road, also known as M-59, in Macomb Township, that Twin Rivers owns. The property is zoned single family residential, but the property has been appraised as commercial in keeping with the master plan designation. Therefore, the Township's Board of Review determined that the property was commercial property and assessed it as follows: true cash value at \$2,422,250; assessed/state equalized value at \$1,211,130; and taxable value at \$1,211,130.

B. TWIN RIVERS' APPEAL OF TAX ASSESSMENTS

Twin Rivers appealed its ad valorem property tax assessments levied by the Township against the property for the 2006 tax year. Twin Rivers purchased the property in 2004 for \$1,100,000. Twin Rivers asserted that its property was zoned residential and should have been assessed as follows: true cash value at \$550,000; assessed/state equalized value at \$225,000; and taxable value at \$225,000. In challenging its assessment, Twin Rivers contended that a majority of the property was situated in a floodplain/floodway, and therefore was unbuildable with the exception of a very small area. Twin Rivers further argued that the property was of an insufficient size for a commercial use.

C. TAX TRIBUNAL HEARING

1. TWIN RIVERS' EVIDENCE

The tax tribunal conducted a hearing in October 2009 to determine the true cash value (or fair market value) of the property for the 2006 tax year. Twin Rivers argued that wetlands encumbered the property and, therefore, the property was unbuildable. To support this claim, Twin Rivers presented three witnesses.

Vincent DiLorenzo, general partner of Twin Rivers, testified that Twin Rivers purchased the property to allow access to a project that it was developing known as Twin Rivers Subdivision. DiLorenzo explained that the property was located between the Clinton River and the Heydenreich Drain. He testified that only a small area (about one to two acres) of the property was level, the rest of the land “dives down about four feet[,] [a]nd that’s what’s holding all of the water[.]” According to DiLorenzo, the water on the land caused problems because it consisted of a designated FEMA floodway and a 100-year floodplain. He explained that the designated FEMA floodway was highly regulated. And while it is generally possible to redirect a floodplain to a less desirable area of land, it was not possible on this particular property because there was no less desirable area to direct it to. Although DiLorenzo admitted that a commercial building could possibly be built on the viable portion of the property, he believed that the wetlands on the property made it impractical and not economically feasible to construct a commercial building on the property.

Jeffrey Hurley, an ecological and environmental consultant, testified that he drafted a wetlands determination report for Twin Rivers in August 2002. He was hired to offer a wetland determination to look for evidence of wetlands and then “determine whether those wetlands are going to be regulated by the State of Michigan and how and why and try to give . . . an approximate idea of their location and their approximate size.” He explained that that determination was the first step in performing a property assessment; the next step would be flagging the wetland boundaries and locking in their exact size and location.

Hurley’s report stated that the elevation of the property was approximately 595 feet above sea level. Hurley further testified that the majority of the property was wooded wetland and river rain wetland. More specifically, Hurley’s report stated that wetlands appeared to occupy more than 5 acres of the property. And during the hearing, he testified that wetlands occupied approximately 7 acres of the 12-acre property. Hurley admitted that the exact size and location of the wetlands on the property was not yet known because they had not yet been flagged and surveyed. Regardless, according to Hurley, his conclusion was that the property contained sufficient wetlands to fall under the jurisdiction of the MDEQ. Hurley confirmed DiLorenzo’s testimony that the floodway areas of the property were regulated by FEMA, and “you can’t place structures in that zone.” And he also confirmed that it was possible to fill in floodplain areas, but a permit was required as well as an allowance for a compensating area—that is, “somewhere else in that watershed” to provide storage capacity.

Anthony Sanna, a real estate valuation expert, also testified for Twin Rivers. Twin Rivers asked Sanna to prepare an appraisal of the property, which he did after personally viewing the property and considering other factors. Sanna testified that the appraisal was “a bit unique

because the property is so unique.” He explained that an appraisal would normally require finding comparables to establish a baseline value, “[b]ut in this case, because we have these extenuating circumstances with the site being predominantly dominated by wetlands and the flood areas, it creates a challenge in terms of trying to determine what kind of comparables are appropriate and how this property would be used.” Therefore, he explained, he spent a “fair amount of time trying to analyze the physical aspects of the property against the market[.]” Based on his analysis, Sanna testified that about four acres, or one-third, of the land was usable, but the financial feasibility of using that land was not an easy question to answer under the circumstances.

Sanna appraised the true cash value of the property at \$550,000. He explained that his appraisal was ultimately based on the property being zoned residential and “applying residential land values to the area that was deemed useable for that purpose[.]” He also placed some value on the wetland area, which could be sold as open space or a park area. Sanna admitted that the usable portion of the property could be used for commercial purposes, but that use would have limited frontage and limited visibility, which would “severely impact the success” of that commercial use. Sanna further testified that the fact that the property had the potential to be zoned commercial under its highest and best use did not necessitate that it be used for a commercial purpose. Indeed, under the circumstances, his appraisal viewed residential use as the highest and best use.

2. THE TOWNSHIP’S EVIDENCE

The Township contended that the highest and best use of the property was as commercial property, and it was assessed accordingly.

Assessor Phyllis Sharbo, was a level three assessor for the Township and the supervisor of the Assessing Department. Sharbo testified that the true cash value of the property was \$2,332,260 and the taxable value of the property for the 2006 tax year was \$1,211,130. Sharbo based these figures on the property’s net size of 9.689 acres (after deductions for a right-of-way and the river). Sharbo described the area where the property was located as “a major commercial thoroughfare” and probably “the most intense commercial thoroughfare in Macomb Township[.]” Sharbo stated that although the property was zoned residential, the property had a master plan designation as commercial. Sharbo stated that it was typical that the properties along Hall Road in Macomb Township bore a residential zoning classification but were rezoned as they became developed. As such, Sharbo indicated that she appraised the property for the 2006 tax year as a commercial property. Sharbo testified that she used the master plan zoning classification “because that is the highest and best use of that property.”

Sharbo explained that in assessing the property, she used four comparable sales that were close in proximity to the property: Braun Steak House, a Jaguar Dealership, a Nissan Dealership, and a Target. After going through each comparable sale’s figures, Sharbo testified that the property was assessed significantly lower than the four comparable sales on both a per acre and a per square foot basis.

Sharbo then went on to discuss the Jaguar Dealership in more detail given the topography of both sites. The Jaguar Dealership and the property were adjacent to each other, shared a

common boundary on the Clinton River, and were the same elevation. Sharbo looked at topography maps to determine what could be done on the respective sites. Sharbo stated that although the Jaguar property contained wetlands, the site had been built on and contained a commercial building. In fact, the Jaguar Dealership building was constructed over the wetland at an elevation of 596 feet. According to Sharbo, the Jaguar Dealership had applied for, and received, a permit from the MDEQ to build in the wetland area. Further, Sharbo testified that the Jaguar Dealership had to relocate a drain in order to develop that site. The construction of the Jaguar Dealership assisted Sharbo in confirming that her assessment of the property was accurate. According to Sharbo, “there’s no reason to believe that the same could not be done” on the property.

On cross-examination, Sharbo admitted that she never went to the property in question, and that she based her assessment on the comparable sales and a mass appraisal. Sharbo stated that she had “no idea” whether there were wetlands on the property. When questioned about Hurley’s testimony regarding the presence of wetlands, Sharbo stated that although she had no reason to doubt his “opinion,” it was not a conclusive determination.

(When questioned on cross-examination why he did not consider the Jaguar Dealership a comparable site, Sanna had testified that he did not believe that site was similarly severely encumbered by wetlands—only one acre of the 7-8 acre Jaguar Dealership site was encumbered. Further, the land was visible and ready for construction when it was purchased.)

D. THE TAX TRIBUNAL’S DECISION

In February 2010, the tax tribunal issued its opinion and judgment. The tax tribunal found that the “subject property does appear to have wetlands that would have a negative influence on the market value of the property.” The tax tribunal acknowledged that there was some discrepancy in the actual estimated amount of wetlands on the property. However, the tax tribunal found, based on the property’s net size of 9.689 acres, that “for valuation purposes only, the subject [property] will have 2.689 acres as developable vacant land with other issues and 7.00 acres of undevelopable property.” The tax tribunal added that “if at some time in the future the area is flagged and the actual acreage is delineated the parties will be required to re-litigate the actual acreage at that time.” However, “[a]t this point in time the Tribunal agrees with [Twin Rivers] that based upon the testimony of both expert witnesses there are multiple issues with subject property.”

More specifically, the tax tribunal found that the property was “overassessed” because

[t]he property is located on Hall Road (M-59), a busy through-fare in Macomb Township. However, due to the elevation of subject property, lack of permanent ingress to subject [property] off of Hall Road, environmental issues that would require mediation, competition for property without any development issues[.]

The tax tribunal noted that the Township “refused to consider that subject property has multiple issues when looking at mass appraisal.” According to the tax tribunal, “[t]he true cash value placed on subject property is not what the market would pay for a problem property.”

The tax tribunal acknowledged that a more accurate designation of the wetlands “may be appropriate.” But, in the tax tribunal’s opinion, “after reading the expert witness Hurley’s report it should have become clearer to [the Township] that the property has issues that are cost prohibitive to development of a commercial property.”

The tax tribunal noted that the Township had compared the property to the Jaguar Dealership. But the tax tribunal pointed out that “[t]here was testimony that if subject property could be mediated there is no other place on the property to move the wetlands.” The tax tribunal also pointed out that even the small area that was buildable had poor visibility. Thus, the tax tribunal concluded,

The expansion of [Twin Rivers’] residential development at some time in the future appears to be a reasonable highest and best use that is feasible.

* * *

The Tribunal finds that [Twin Rivers] has carried his [sic] burden of proving that the assessment exceeds the market value of subject property.

* * *

It is clear to this Tribunal that subject property has extraordinary impediments to the development of the vacant land. The wetland area and permits required are not the only area that the subject property has for negative influences. The property has an irregular shaped parcel that is buildable in one area that is not visible to Hall Road traffic and would not be cost effective to construct. It does not appear that subject property has water and sewer which would be a requirement to develop this property. Sanna’s estimate of buildable property for an extension of [Twin Rivers’] current residential subdivision is the only sane option presented.

Accordingly, the tax tribunal accepted Twin Rivers’ calculations and reduced the true cash value of the property from \$2,422,250 to \$550,000 and the taxable value from \$1,211,130 to \$225,000. The Township now appeals.

II. REVIEW OF THE TAX TRIBUNAL’S DECISION

A. STANDARD OF REVIEW

Absent allegations of fraud, this Court’s review of a tax tribunal decision is limited to determining whether the tribunal erred in applying the law or adopted a wrong principle.¹ And the tax tribunal’s factual findings are conclusive and will not be disturbed if they are supported

¹ *Moshier v Whitewater Twp*, 277 Mich App 403, 407; 745 NW2d 523 (2007); *Stege v Dep’t of Treasury*, 252 Mich App 183, 187-188; 651 NW2d 164 (2002).

by competent, material, and substantial evidence on the whole record.² But to the extent that this Court must construe the meaning of the statute in reviewing the tax tribunal's decision, our review is de novo.³ "Substantial evidence must be more than a scintilla of evidence, although it may be substantially less than a preponderance of the evidence."⁴

B. LEGAL STANDARDS

Under MCL 205.737(3), "[t]he petitioner has the burden of proof in establishing the true cash value of the property." MCL 211.27(1) provides that

"true cash value" means the usual selling price at the place where the property to which the term is applied is at the time of assessment, being the price that could be obtained for the property at private sale, and not at auction sale except as otherwise provided in this section, or at forced sale.

"True cash value is synonymous with fair market value."⁵ "The Tax Tribunal is under a duty to apply its expertise to the facts of a case to determine the appropriate method of arriving at the true cash value of property, utilizing an approach that provides the most accurate valuation under the circumstances."⁶

C. COMPETENT, MATERIAL, AND SUBSTANTIAL EVIDENCE ON THE RECORD

The Township argues that the tax tribunal's decision to reverse the Township's assessment of Twin River's taxable and assessed property values was not supported by competent, material, and substantial evidence on the record. More specifically, the Township argues that Twin Rivers failed to carry its burden of proving that the actual amount of acreage of wetlands on the property and that the property was unbuildable. Therefore, according to the Township, the tax tribunal's determination that the property was unbuildable due to the presence of wetlands was not supported by competent, material, and substantial evidence on the record. We disagree.

Despite the lack of a specific finding regarding the actual amount of acreage of wetlands on the property, there was no question that a significant portion of the property was wetlands. As evidenced by the tax tribunal's findings of fact and conclusions law, it relied on the various

² *Stege*, 252 Mich App at 188; *Czars, Inc v Dep't of Treasury*, 233 Mich App 632, 637; 593 NW2d 209 (1999).

³ *Signature Villas, LLC v City of Ann Arbor*, 269 Mich App 694, 699; 714 NW2d 392 (2006).

⁴ *Jones & Laughlin Steel Corp v Warren*, 193 Mich App 348, 352-353; 483 NW2d 416 (1992).

⁵ *County of Wayne v Mich State Tax Comm'n*, 261 Mich App 174, 200; 682 NW2d 100 (2004), quoting *Jones & Laughlin Steel Corp v City of Warren*, 193 Mich App 348, 353; 483 NW2d 416 (1992).

⁶ *Jones & Laughlin Steel Corp*, 193 Mich App at 353 (internal citations omitted).

witnesses' testimony and reports to determine how much of the property was wetlands. Specifically, it relied on Hurley's testimony that approximately 7 acres of the property contained wetlands. Although this was only an estimate, the tax tribunal was not required to disregard this testimony and accept Sharbo's valuations, which did not take any amount of wetlands into account. Therefore, we conclude that the tax tribunal's determination that Twin Rivers met its burden of proving that wetlands comprised a majority of the property, and, therefore, its market value was negatively influenced, was supported by competent, material, and substantial evidence on the record.

D. HIGHEST AND BEST USE

The Township argues that the tax tribunal committed legal error or adopted a wrong principle by failing to set forth a highest and best use analysis in its opinion. The Township argues in its brief on appeal that "there was no analysis of the highest and best use found anywhere in the Tax Tribunal's decision. . . . [T]he Tax Tribunal never even mentions highest and best use[.]" This argument is without merit. Contrary to the Township's contentions, the tax tribunal did in fact take into account the highest and best use of the property in its analysis. Specifically, the tax tribunal concluded that "[t]he expansion of [Twin Rivers'] residential development at some time in the future appears to be a reasonable highest and best use that is feasible[.]" and that "Sanna's estimate of buildable property for an extension of [Twin Rivers'] current residential subdivision is the only sane option presented."

In sum, we conclude that the tax tribunal's factual findings were supported by competent, material, and substantial evidence on the whole record⁷ and the tax tribunal did not err in applying the law or adopt a wrong principle.⁸

We affirm.

/s/ Michael J. Kelly
/s/ E. Thomas Fitzgerald
/s/ William C. Whitbeck

⁷ *Stege*, 252 Mich App at 188; *Czars*, 233 Mich App at 637.

⁸ *Moshier*, 277 Mich App at 407; *Stege*, 252 Mich App at 187-188.